IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

ERRATA CORRECTING
STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING COUNTS 1, 2, 3, 4, 5, 9 AND 10 DUE TO LACK OF DEFENDANT-SPECIFIC CAUSATION AND DISMISSING CLAIMS OF JOINT AND SEVERAL LIABILITY UNDER COUNTS 4, 6, AND 10" (DKT. #2069)

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CASES:

STATUTES:

Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 9 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6 and 10" [Dkt. #2069] (which has been joined by all Defendants)[1] ("Motion" or "MSJ") be denied in its entirety.

Statement of Disputed Material Facts[2]

2. Defendants Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress have admittedly conducted similar (i.e. "homogenous") business activities within the IRW. *See* Dkt. #1238, ¶¶ 1, 7-9. Also, while Tyson Poultry, Inc. contracts with growers in the IRW (*see, e.g.*, Ex. 1 (TSN107938SOK)), in its "Environmental Poultry Farm Management" manual distributed to growers, the corporate entity is referred to simply as "Tyson." Dkt. #2081-3. Tyson Poultry, Inc. is merely a subsidiary of Tyson Foods, Inc. *See* Dkt. #2069-11. Further, in this litigation, all of the Tyson Defendants are represented by joint counsel and are pursuing a joint defense. *See* Dkt. #1238.

3. Defendant Cargill, Inc. is the parent company of Defendant Cargill Turkey Production, LLC (hereinafter collectively "Cargill" or "Cargill Defendants"). Ex. 2 (Maupin Dep., pp. 302-03). Cargill Turkey Production has only been in existence since June 2004. *Id.* at

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[1] *See* "Cargill Defendants' Joinder in Defendants' Motion for Summary Judgment." Dkt. #2086.

[2] In footnote 2 of Defendants' MSJ, they state that "for the convenience of the Court" they have attached a Joint Appendix, which "separately sets forth the relevant facts and evidence with respect to each of the individual undersigned Defendants for the Court's consideration in connection with the present motion." The "Joint Appendix" contains over five (5) pages of single-space text with multiple statements of purported fact and citations to the record. *See* Dkt. #2069-2. None of the statements of purported fact in the Joint Appendix is contained in the MSJ itself. The State has moved to strike the Joint Appendix on the grounds that it violates the Court's Local Rules regarding page limitations and summary judgment briefs. *See* Dkt. #2134. The State does not explicitly respond to the Joint Appendix herein. Should the Court allow the Joint Appendix, the State reserves the right to respond further to the MSJ as may be appropriate.

8. Cargill, Inc. first entered the poultry production business in the IRW in the mid-1970s. *Id.* at 286. The Cargill Defendants are represented by joint counsel in defending against the State's claims in this case. *See, e.g.*, Dkt. #2086. The foregoing demonstrates that the Cargill Defendants are "homogenous" in their actions.

4. Defendants George's, Inc. and George's Farms, Inc. ("George's") are represented by joint counsel, are pursuing a joint defense in this action, and have admitted to conducting similar (i.e., "homogenous") business activities within the IRW. *See* Dkt. #1237, ¶¶ 14-15.

5. Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. ("Cal-Maine") are represented by joint counsel, are pursuing a joint defense in this action, and have admitted to conducting similar (i.e., "homogenous") past business activities within the IRW. *See* Dkt. #1239, ¶¶ 10-11.

6 & 7. Defendants fail to support these paragraphs with evidence. Defendants are not competitors, but are largely "homogenous," in their efforts to quell public and governmental concern regarding the environmental damage caused by the common activity of disposing of poultry waste by land application. *See, e.g.*, Dkt. #2081-6 (9/10/04 Ad); Dkt. #2103-6 (9/8/97 letter from Poultry Federation to *Tulsa World*). Defendants have also been "homogenous" in their efforts to avoid environmental regulation and liability. *See, e.g.*, Ex. 3 (4/25/06 (7:41pm) Email and Attachment to C. Brown).

9. Many contract growers in the IRW are actually corporate entities. *See, e.g.*, Dkt. #2125-2 (collective exhibit reflecting cooperate entities as contract growers) (Filed Under Seal). Moreover, the growers' independence is disputed. Defendants exercise control over their growers and all essential aspects of poultry production. *See* Dkt. #2065-4 (Taylor P.I. Test., pp. 929-35, 940-44); Dkt. #2119-24 (2001 Atty. Gen. Op. 17, ¶ 11); Ex. 20 (6/09 Taylor Decl.).

Defendants own and supply the feed the birds eat, *see* Dkt. #2065-18 (Storm Dep., pp. 47-48); Dkt. #2065-7 (McClure Dep., pp. 135-36); Dkt. #2066-5 (Maupin Dep., pp. 142-43); Dkt. #2066-6 (Butler Dep., p. 16); Dkt. #2066-7 (Houtchens Dep., pp. 147-48); Dkt. #2066-3 (Murphy Dep., p. 141); Dkt. #2065-11 (Pilkington Dep., pp. 49-50); Dkt. #2065-12 (Schaffer Dep., p. 14); decide when the birds are delivered, *see* Dkt. #2065-10 (Dicks Dep., p. 116); Dkt. #2065-7 (McClure Dep., p. 134); Dkt. #2066-8 (Schwabe Dep., p. 47); Dkt. #2066-9 (Wear Dep., pp. 26-27); Dkt. #2066-3 (Murphy Dep., pp. 140-41); Dkt. #2065-11 (Pilkington Dep., p. 49); decide the number of birds delivered, *see* Dkt. #2065-10 (Dicks Dep., p. 116); Dkt. #2066-10 (Alsup Dep., p. 261); Dkt. #2066-9 (Wear Dep., p. 26); and dictate where the growing operations are located, *see* Dkt. #2065-10 (Dicks Dep., p. 115); Dkt. #2070-1 (Alsup Dep., p. 58); Dkt. #2065-7 (McClure 8/15/07 Dep., p. 176); Dkt. #2066-7 (Houtchens 7/26/07 Dep., p. 30); Dkt. #2066-3 (Murphy Dep., p. 171); Dkt. #2070-5 (Tyson website page). The structure of the contracts with the growers -- generally flock to flock -- underscores the control Defendants have over the growers, as Defendants can simply decline to deliver new birds to a particular grower. *See* Dkt. #2065-4 (Taylor P.I. Test., pp. 933-35). And, as demonstrated by the *City of Tulsa* settlement and its implementation, Defendants have the ability to control the growers and the disposal of the poultry waste. *See* Dkt. #2070-10 (Tolbert P.I. Test., pp. 94-95); Dkt. #2070-11 (*City of Tulsa* Consent Decree, pp. 8-9).

10. There is commonality in the characteristics of contract grower farms within the IRW. For instance, as established, Defendants dictate where the growing operations are located. *See* ¶ 9, *supra.* Indeed, Defendants Tyson and Peterson actually specify the maximum allowable distance between the broiler farm and the feed mill. Ex. 4 (Houtchens 7/26/07 Dep., pp. 28-30); Dkt. #2070-5 (Tyson website page). Defendants' poultry feeding operations are dispersed

geographically across the IRW. *See* Dkt. #2076-6 (State's P.I. Ex. 113); Dkt. #2076-7 (State's P.I. Ex. 397). And "contaminants deposited on the surface within the [IRW] are prone to runoff from soils in about half of the watershed and are prone to infiltration through soils in the remaining half of the watershed." *See* Dkt. #2088-1 (Fisher Decl, 3/5/09, ¶ 6); *see also* Ex. 5 (Chaubey Dep., 137:12-138:6; 141:3-19).

11. Contrary to Defendants' representation to the Court, page 6 of Docket Number 1775 does *not* establish that "[s]ome Defendants do not contract, or have never contracted, with any Contract Growers within the IRW," but instead establishes only that Defendant Peterson no longer has any *company-owned* poultry production facilities within the IRW. *See* Dkt. #1775. Defendants Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Cargill Turkey Production, George's, Simmons, Peterson and Cal-Maine have all admitted to contracting with growers to raise their birds in the IRW and/or actively engaging in their own poultry growing operations within the IRW either currently or in the past. *See* Dkt. #1236, ¶ 16; #1237, ¶¶ 14-15; #1238, ¶¶ 1, 7-9; #1239, ¶¶ 10-11; #1241, ¶ 13; #1243, ¶ 17.

12. Poultry litter, also known as poultry waste, consists of poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation. *See* 2 Okla. Stat. § 10-9.1(B)(21). Poultry waste contains large amounts of phosphorus. *See* Dkt. #2076-12 (1997 Tyson Environmental Poultry Farm Management, p. 3); Dkt. #2077-3 (Poultry Water Quality Handbook, at PIGEON.0643). It also contains the bacteria *E. coli*, *Salmonella* and *Campylobacter*, *see* Ex. 6 (Teaf P.I. Test., pp. 205 & 207); Ex. 7 (Lawrence P.I. Test., pp. 1169-70); Ex. 8 (Harwood P.I. Test., p. 642), which can cause gastroenteritis, nausea, vomiting, watery and/or bloody diarrhea, and even death in

humans. *See* Ex. 7 (Lawrence P.I. Test., p. 1193); Ex. 8 (Harwood P.I. Test., p. 640); Ex. 9 (State's P.I. Exhibit 404).

13. It is a widely-accepted scientific fact -- not mere "allegation" of the State's experts -- that there are "excessive amounts" of phosphorus and bacteria in recreational water bodies in the IRW such as Lake Tenkiller and the Illinois River. *See, e.g.*, Dkt. #2084 (USDA (July 2006), pp. 18-19); #2100 (USGS (2006), p. 20); #2076-4 (AWRC (2002), p. 11); #2103-15 (2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16).

14. & 15. Ample evidence shows that each Defendant has contributed to an indivisible harm – widespread pollution of the water bodies of the IRW. A large number of birds owned by *each* of the Defendants have been raised in the IRW (*e.g.*, in 2007 alone, over **83 million** of the Tyson Defendants' birds were raised in the IRW). *See* Dkt. #2065-14 (Tyson Foods answer to Int. #1); #2065-15 (Tyson Chicken answer to Int. #1); #2065-16 (Tyson Poultry answer to Int. #1); #2065-18 (Storm 10/8/07 Dep., pp. 110-12); #2065-20 (Cargill Inc.'s Second Supp. Answer to Interrog. 1); #2065-17 (Cobb-Vantress's answers to Int. 1); #2065-20 (Cargill Inc.'s Second Supp. Answer to Int. 1); #2065-21 (Cargill Turkey's Second Supp. Answer to Int. 1); #2065-22 (George's Defendants' Supp. Answer to Int. 1); #2066 (Peterson's Second Supp. Answers to Int. 1); #2066-3 (Murphy Dep., pp. 155-59, 266); #2066-4.

Defendants' birds are housed at the approximately 1917 active poultry houses in the IRW. *See* Dkt. #2076-2 (Fisher 9/3/08 Dep., p. 143). Active poultry houses, *each linked to a specific Defendant* are located throughout the IRW. *See* Dkt. #2076-6 (State's P.I. Ex. 113); Dkt. #2076-7 (State's P.I. Ex. 397). Defendants' own data shows that birds owned by each of the Defendants have generated massive amounts of poultry waste within the IRW. *See* Dkt. #2076-8 (5/14/09 Engel Aff., ¶ 6) (*e.g.*, In 2006 alone, birds owned by Tyson and Cobb generated

223,256 tons (or approximately **447 million pounds**) of waste in the IRW). Collectively, in the IRW Defendants' birds generate between 354,000 tons and more than 500,000 tons of poultry waste annually. *Id.*

Poultry waste contains "relatively large amounts of phosphorus." Dkt. #2076-12 (1997 Tyson Environmental Poultry Farm Management, p. 3). Poultry waste also contains the bacteria *E. coli*, *Salmonella* and *Campylobacter*. *See* Ex. 6 (Teaf P.I. Testimony, Tr. Vol. I, pp. 205, 207). Defendants are aware that it has been the practice to apply the poultry waste generated by their birds to the land in the IRW. *See, e.g.*, Dkt. #2076-12 (1997 Tyson Environmental Poultry Farm Management, p. 14) ("The majority of producers will apply poultry manure to their pastures or croplands which will be used as fertilizer."); #2081-3 (2004 Tyson Environmental Poultry Farm Management, p. TSN0076CORP) ("Land application is the most common and beneficial method to utilize the nutrients in poultry litter."); #2081-5 (12/5/04 advertisement by several Defendants); #2065-10 (Dicks Dep., p. 194). The vast majority of this poultry waste is land applied in close proximity to the active poultry houses where it is generated. *See* Dkt. #2081-12 (Engel P.I. Test., pp. 446-67); #2076-2 (Fisher Dep., pp. 158-60); #2088 (3/5/09 Fisher Aff., ¶ 5); #2076-11 (Daniel 11/26/07 Dep., pp. 26-27); #2081-4 (Chaubey Dep., pp. 35). The primary method of disposal of poultry waste is land application. Dkt. #2081-4 (Chaubey Dep., pp. 32-33). Poultry waste is the dominant source of phosphorus loading in the watershed. *See id.* at 74-75; Dkt. #2100-4 (Smith 9/10/08 Depo., p. 41); Dkt. #2100-5 (Smolen 3/27/09 Depo., pp. 138-39). Significant amounts of poultry waste from *each* Defendant's birds have been land applied in the IRW. *See* Dkt. #2088-4 (Table 8 to Fisher Report); #2076-2 (Fisher 9/3/08 Dep., pp. 184-93) (testimony regarding Table 8 to Fisher Report).

At a soil test phosphorus ("STP") level of 65 lbs/acre or higher, there is virtually no agronomic benefit gained from applying additional phosphorus. *See* Dkt. #2088-7 (Zhang Dep., p. 189); #2088-8 (Mullikin Dep., pp. 119-20); #2088-9 (Johnson Rpt., ¶ 5). Land application of poultry waste on fields with an STP of 120 lbs/acre constitutes disposal of poultry waste without benefit to crop production and with an increased risk to water quality by runoff and erosion. *Id.* *See* Dkt. #2088-10 (OSU, PT 98-1, p. 5). *See also* Dkt. #2088-11 (Chaubey Dep., pp. 231-35); #2088-8 (Mullikin Dep., pp. 49-50). High STP levels are indicative of the over-application of poultry waste. Dkt. #2088-11 (Chaubey Dep. at 175-76); #2088-9 (Johnson Rpt., ¶ 7(e) and (i)).

Available STP data show that the majority of fields linked to Defendants are in excess of the disposal threshold of 120 lb/acre STP. *See* Ex. 10 (Fisher Decl., ¶ 11 and Attachment A). Indeed, many of the soil tests reflect STP levels in excess of 600 lbs/acre (5 times the disposal threshold), and some are over 1,200 lbs/acre (10 times the disposal threshold). *Id.* ¶ 11. For instance, one field of a Tyson grower tested at 1,529 lbs/acre STP while another Tyson grower's field had an STP of 1,256 lbs/acre. *Id.* ¶ 12. Indeed, soil tests from Tyson's own Research Farm in Springdale have reflected STP levels as high as 726 lbs/acre. *Id.* ¶ 12. Fields on one Cobb-Vantress grower's farm tested at between 747 lbs/acre and 1,001 lbs/acre STP. *Id.* ¶ 13. Available Arkansas soil test data for George's growers ranges from a *low* of 615 lbs/acre STP to a high of ***2,166 lbs/acre*** STP. *Id.* ¶ 14. One Cargill (trade name Honeysuckle White) grower had an STP of 1,424 lbs/acre and another had an STP of 1,063 lbs/acre. *Id.* ¶ 15. The STP for one Peterson grower's field was 1,355 lbs/acre; another Peterson grower had a field with an STP of 671 lbs/acre. *Id.* ¶ 16. Simmons grower soil tests results reflect STP levels of 967 lbs/acre and 1,168 lbs/acre. *Id.* ¶ 17. Lastly, Cal-Maine had a grower with an STP of 758 lbs/acre. *Id.* ¶ 18.

The President and COO of George's has admitted that: (a) "the problem comes when more litter is used than the crops need and phosphorus levels become too high in the soil"; and (b) "[d]uring major rain events some of the phosphorus becomes soluble and washes off into the streams and lakes." Dkt. #2103-5 (GE35775). Cargill has also made an admission with respect to nutrient runoff. Dkt. #2103-4 *(Filed Under Seal).* Tyson's former Director of Environmental Agriculture has acknowledged that elevated STP levels (such as recorded at the Tyson Research Farm) increase the risk for nutrient runoff. Dkt. #2099-2 (Keller Dep., pp. 156-58).

The surface water and groundwater of the IRW are highly susceptible to phosphorus and bacteria pollution from land-applied poultry waste because of the terrain and geology of this area, the manner of land application, and the nature of poultry waste. *See* Dkt. #2088-6 (5/14/09 Fisher Aff., ¶¶ 7-27). "[L]and application of poultry waste to the karst terrain of the [IRW] means that constituents of this waste…travel readily through the soils and underlying geologic media to discharge at and into ground water springs and surface streams throughout the [IRW]." *Id.* ¶ 12. "[D]issolved material derived from poultry waste will also move with the runoff and pollute surface water." *Id.* ¶ 27.

As demonstrated in the State's Motion for Partial Summary Judgment (Dkt. #2062) and exhibits, there are numerous and varied sources of evidence that establish that land-applied poultry waste and its constituents are in fact transported from fields to surface and groundwater in the IRW. *See, e.g.*, Dkt. ##2080 & 2080-3 (USDA Farm Service Agency (August 2007), pp. 16 and A-5-A-6); ##2084 & 2084-2 (USDA Farm Service Agency (July 2006), pp. 18-19, 40); #2100 (USGS (2006), p. 4); #2104-6 ("Focus on Phosphorus" Proceedings, p. 8); #2102-7 (D. Storm Depo., pp. 47, 106); #2100-5 (Smolen Depo., pp. 138-39); #2103-4 (Cargill Contract Grower Environmental Best Management Practices Guide, p. CARTP000009) (*Filed Under*

Seal); #2081-5 (12/5/04 advertisement); #2070-9 (3/27/98 memo from Mullikin to Henderson); #2103-5 (GE35775); #2103-6 (9/8/97 letter from Poultry Federation to *Tulsa World*); #2076-2 (Fisher Depo., pp. 113-17); #2081-7 (Ryan P.I. Opening., p. 46). Indeed, the evidence shows that poultry waste land application in the IRW is a substantial contributor (45 percent between 1998 and 2006, and 59 percent between 2003 and 2006) to P loads to Lake Tenkiller representing the largest P source. Dkt. #2103-7 (Engel Depo., pp. 29-30 & 87-88).

Dr. Indrajeet Chaubey, an independent, nonretained expert who has extensively studied nutrient transport in the IRW,[3] has testified that: (a) "there will always be some losses taking place from the areas…treated with the poultry waste"; and (b) "[p]oultry litter is the biggest source of nutrients [in the IRW] when you look at all the sources, and given that fact and given the fact that it runs off the fields, it will be logical to conclude that significant amount of phosphorus in the [Illinois] river is coming from the areas that are treated with poultry litter." Dkt. #2088-11 (Chaubey Depo. at 168, 163-64) (emphasis added). *See also* Dkt. #2081-9 (Parrish Depo., p. 94). Defendants' own expert, Dr. John Connolly, has testified that all of the studies he looked at conclude that phosphorus runs off fields to which poultry waste has been applied, that the run-off concentrations are substantial compared to reference fields and that he has not identified any study where poultry waste has been applied that phosphorus did not run off the field. *See* Dkt. #2100-3 (Connolly Depo. at 235-36).

16. It is irrelevant whether the State can identify specific growers as the source of phosphorus or bacteria in the water bodies of the IRW. The acts of each Defendant have combined to cause an indivisible harm -- widespread pollution of the water bodies of the IRW. *See, e.g., supra,* ¶¶ 13-15. Contrary to Defendants' assertion, Dr. Fisher did not testify that he

[3] For information about Dr. Chaubey's background and qualifications, see Exhibit 5 (Chaubey Depo., pp. 7-13, 15-16, 21-28).

could not identify any grower as a source of phosphorus or bacteria found in the water bodies of the IRW. Instead, Dr. Fisher said that he believes that the "edge of field work…was conducted [such that they] were able to identify specific origins of waste and specific locations of waste…" Dkt. #2069-4 (Fisher Dep. at 80). Edge of field runoff samples collected from locations within the IRW where poultry waste generated by growers under contract with Tyson, Simmons and Peterson had been land disposed show "high levels of phosphorus, zinc, copper, arsenic, E. coli, total coliform, fecal coliform and enterococcus consistent with contamination by poultry waste and/or poultry waste constituents." Ex. 10 (Fisher Decl., 5-27-09, ¶¶ 26-28). Nonetheless, once poultry waste is in the surface water or groundwater, it cannot be traced back to a specific grower. Dkt. #2073-14 (Harwood Dep. at 168-69).

17. It is irrelevant whether the State can "link any specific instances of contamination of groundwater or surface water traced back to the land application of poultry litter generated on a farm operating under contract with any specific Defendant." The acts of each Defendant have combined to cause an indivisible harm -- widespread pollution of the water bodies of the IRW. *See, e.g., supra*, ¶¶ 13, 15-16. Again, once poultry waste is in the surface water or groundwater, it cannot be traced back to a specific grower. Dkt. #2073-14 (Harwood Dep. at 168-69).

18. Each of the Defendants has necessarily contributed more than "zero" to the contamination of water bodies of the IRW. *See supra,* ¶¶ 13-16. Large amounts of poultry waste generated by Defendants' birds have been land applied within the sensitive terrain of the IRW, and there will *always* be some losses (*i.e.* runoff or infiltration) taking place from the areas treated with the poultry waste. *Id.*

19. Poultry waste is not a good fertilizer or soil conditioner. *See* Dkt. #2076-9 (Johnson P.I. Test., pp. 489-91). This is especially true where, as here, there is evidence that

poultry waste has been land applied well in excess of any agronomic need. *See supra* ¶¶ 14-15. Moreover, land-applied poultry waste is not incorporated into the soil by tilling, and so it can run off more easily. *See* Dkt. #2076-2 (Fisher Dep., pp. 156-57).

20. The State regulates poultry waste through a registration law, *see* 2 Okla. Stat. § 10-9 *et seq.*, providing that there shall be no runoff from the application sites; and "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (4)(b); (C)(6)(c); *see also, e.g.*, 27A Okla. Stat. § 2-6-105(A). Defendants have not complied with these laws. *See supra* ¶¶ 13-16. The State does not issue permits or authorizations for the land application of poultry waste. *See* Dkt. #2081-8 (Gunter Dep. pp. 175-79, 180-81, 187-88); #2081-11 (Strong Dep., p. 245); *see also* 2 Okla. Stat. § 10-9, *et seq.*; Dkt. #2081-8 (Gunter Dep., pp. 175-79 & 180-81); #2081-9 (Parrish Dep., pp. 140 & 152-53); #2081-10 (Tolbert Dep., p. 222); #2081-11 (Strong Dep., pp. 211, 220, 245). These statutes and regulations were enacted *because* of the land application of poultry waste. Ex. 11 (Parrish Dep. p. 60).

21. The presence of a Nutrient Management Plan ("NMP") or Animal Waste Management Plan ("AWMP") does not assure compliance with Oklahoma's statutory requirements. Dkt. #2081-8 (Gunter Dep., pp. 175-79 & 180-81); #2081-9 (Parrish Dep., pp. 140 & 152-53). Poultry waste may not lawfully be applied by growers or applicators in a manner that is inconsistent with a NMP or AWMP or that causes runoff. Ex. 12 (Littlefield P.I. Test., pp. 2016-17); Dkt. #2081-9 (Parrish Dep. p. 94).

22. Defendants' contracts with their growers, with the exception of Defendant Peterson's contracts since 1999 and Simmons' contracts since 2008, do not transfer ownership of

the poultry waste to the growers. *See* Dkt. #2065-4 (Taylor P.I. Test., p. 938); Dkt. #2070-7 (Taylor Dep., pp. 132-34); Dkt. #2070-8 (5/14/09 Taylor Aff., ¶ 15). With respect to Defendants Peterson and Simmons, its contracts with its growers are non-negotiable, *see* Dkt. #2066-9 (Wear Dep., pp. 39 & 56-57) & Dkt. #2066-3 (Murphy Dep., p. 230), even as to responsibility for poultry waste. *See* Dkt. #2066-9 (Wear Dep., pp. 39 & 56-57); Dkt. #2070-7 (Taylor Dep., pp. 55-56).

23. Growers do not have unbridled discretion with respect to the use of poultry waste. For example, Defendants specify clean-outs and cake-outs of the poultry houses. *See* Dkt. #2070-1 (Alsup Dep., pp. 45-48, 52-53); Dkt. #2066-6 (Butler Dep., p. 25); Dkt. #2070-6 (Williams Dep., 14-15); Dkt. #2070-4 (Pigeon Dep., p. 75); Dkt. #2066-3 (Murphy Dep., p. 199); Dkt #2125-4 (Tyson Broiler Production Manual, at TSN0039CORP); Dkt #2125-5 (Tyson Pullet Rearing Guide, at TSN0138CORP); Dkt. #2125-5 (Cobb-Vantress Comprehensive Grandparent Pullet Management Guide, at TSN0273CORP); Dkt. #2125-6 filed under seal (Peterson Grower Handbook, at PFIRWP-000604); Dkt. #2125-7 (Cargill Turkey Products Contract Grower Best Management Practices Guide, at CARTP000391-392)(Filed Under Seal); Dkt. #2125-8 (George's Broiler Grower Handbook, at GE-HB 0024).

24. Poultry waste is not being used as fertilizer in the IRW. *See* Stat. of Undisp. Facts ¶¶ 14-15, *supra.* Moreover, the exhibits cited by Defendants do not support the proposition for which they are cited. Without limitation, Exhibits 39 and 40 do not reflect that poultry waste was sold or given away, or that if it was sold or given away, how much and to whom it was sold or given away. Exhibits 38 and 41 similarly do not reflect that poultry waste in Arkansas was sold or given away *to third parties*, *see* Ex. 13 (Engel Dep., pp. 132-42) ("it's been impossible to get clear definitions as to what some these columns mean, transferred in

particular"), how much might have been sold or given away *to third parties*, or the relationship of such third parties to Defendants. Also, there are doubts as to the validity of the ANRC data. *See id.* That the enormous amounts of poultry waste generated by Defendants' birds raised in the IRW are land applied in the IRW is the foreseeable means by which waste from Defendants' birds is disposed of. *See* Dkt. #2120-1 (Tyson Environmental Poultry Farm Management at p. 14); Dkt. #2081-3 (at p. TSN0076CORP); Dkt. #2081-4 (Chaubey Dep., p. 32-33); Dkt. #2081-5 (12/5/04 advertisement); Dkt. #2081-6 (9/10/04 advertisement); Dkt. #2065-10 (Dicks Dep., p. 194); Dkt. #2081-7 (Ryan P.I. Opening., p. 46).

25. It is irrelevant whether the State has land applied poultry waste within the IRW because the combined acts of each Defendant have caused an indivisible harm -- widespread pollution of the water bodies of the IRW. *See, e.g., supra,* ¶¶ 14-15. Any poultry waste land applied by the State is *de minimis* in comparison to the hundreds of thousands of tons annually generated by Defendants' birds and spread in the IRW. *See, e.g.,* Dkt. #2075-9 (Ford Dep. at 68) (pickup load of composted litter applied to the flower beds at the OSRC headquarters building).

26 & 27. The existence of phosphorus compounds and bacteria on real property owned by the State and storm water runoff from this property is irrelevant and immaterial with respect to the viability of any of the State's claims at issue in Defendants' MSJ. Further, Defendants have presented no evidence as to the volume or amount of the referenced phosphorus compounds, bacteria or storm water runoff.

31. Defendants provide no evidentiary support[4] for the statement that "[p]ursuant to the State's authorization, human sewage wastewater has been applied to flora adjacent to

[4] Exhibit 44 to Defendants' MSJ is the unsworn expert report of Ron Jarman, one of Defendants' retained experts. *See* Dkt. #2075-10. Unsworn expert reports are not admissible under Rule 56(e) to support or oppose summary judgment. *See Sofford v. Schindler Elevator*

roadways in the IRW for more than 30 years." In fact, it is the State of Oklahoma's testimony that it is not doing any land application of waste water or fluids from the lagoons at Lake Tenkiller State Park. Ex. 14 (Ford Dep., Vol. II at 150).

32-35. Defendants' statements concerning septic tanks, pit privies and wastewater lagoons are irrelevant -- and thus, not "material" -- with respect to the viability of any of the State's claims at issue in Defendants' MSJ. Further, Defendants do not identify, let alone quantify, any constituent of concern that has been released from any septic tank, pit privy or lagoon into a water body of the IRW.

36. Defendants have failed to provide any admissible summary judgment evidence in support of their statement concerning the "258 dry tons of human sewage," or evidence any of its constituents polluted any water. The unsworn Jarman expert report relied upon is inadmissible and should be disregarded. *See* Stat. of Disp. Facts ¶ 31, *supra.* In any event, the alleged 258 dry tons of human sewage pales in comparison to the hundreds of thousands of tons of poultry waste generated by Defendants' birds and land applied annually in the IRW. *See* Stat. of Disp. Facts ¶¶ 14-15, *supra.*

37 & 38. Defendants' statements of fact concerning an Administrative Compliance Order and effluent from a lagoon are irrelevant -- and thus, not "material" -- with respect to the viability of any of the State's claims at issue in Defendants' MSJ. Further, Defendants do not identify, let alone quantify, any constituent of concern that has been released from any holding tank, lift station or lagoon into a water body of the IRW.

Corp., 954 F. Supp. 1459, 1463 (D. Colo. 1997). This report, and all other unsworn expert reports submitted by Defendants, should be disregarded.

39. While it is true that a certain Sludge Management Permit was amended in 2004 allowing Tenkiller State Park to land apply human sewage sludge, no such land application took place. Ex. 14 (Ford Dep., Vol. II at 150); Ex. 15 (S. Williams Dep. at 112-14).

40-44. Defendants' statements of fact concerning the use of commercial fertilizer on State property are irrelevant -- and thus, not "material" -- with respect to the viability of any of the State's claims at issue in Defendants' MSJ. Further, *all* commercial fertilizer used in the IRW only amounts to approximately 7.5% of the phosphorus loading in the Watershed. Dkt. #1919-2 (M. Smith Decl. and Report at 1).

45. Defendants have misrepresented the State's Response to the referenced Request for Admission # 69. In truth, the State *denied* that cattle contribute "in the sense of adding or supplying" phosphorus compounds to the environment of the IRW. *See* Dkt. #2075-8 at 30. The State's denial in this regard is well supported by scientific evidence that cattle largely recycle pre-existing nutrients. *See* Dkt. #2081-4 (Chaubey Dep., p. 49-50); Dkt. #2076-2 (Fisher Dep., p. 123); Dkt. #2100-4 (Smith Dep., p. 65); Dkt. #2076-4 (Arkansas Water Resources Center, MSC-336, (2002), p. 7); Dkt. #2065-10 (Dicks Dep., p. 244).

46. Defendants' statement of fact concerning increased sediment due to the construction of unpaved roads is irrelevant -- and thus, not "material" -- with respect to the viability of any of the State's claims at issue in Defendants' MSJ. The State further notes that Defendants have provided no evidence as to the volume or amount of increased sediment or the origin of constituents contained in that sediment.

47. Mike Smolen's erosion rate estimate relied upon by Defendants is based on a study conducted outside of the IRW. Dkt. #2075-23 (Smolen Dep. at 109-10). Dr. Smolen testified that he is not aware of "any particular study of road erosion" in the IRW and that he

expects that the IRW is "probably a little less erodible than" the area he studied. *Id.* Thus, Dr. Smolen's testimony with respect to road erosion rates is irrelevant.

48. The State has objected to the Requests for Admission relied upon by Defendants on the grounds that they are vague and ambiguous in that the term "'contribute' is not defined with reference to amount or origin…" Dkt. #2075-8 at 75 (RFA 203 and 205). And Defendants have provided no evidence in the MSJ as to the amount or origin of phosphorus or nitrogen from dirt or gravel roads contributed to surface waters in the IRW.

49 & 50. The State's issuance of discharge permits to Tahlequah Public Works Authority, City of Stillwell and Westville Utility Trust is irrelevant -- and thus, not "material" -- with respect to the viability of any of the State's claims at issue in Defendants' MSJ.

51-53. The only evidentiary support for phosphorus discharge rates offered by Defendants is the unsworn expert report of Dr. Jarman. As established, this unsworn report is not admissible under Rule 56(e) to support or oppose summary judgment. *See* Stat. of Disp. Facts ¶ 31, *supra.* Further, permitted wastewater treatment plant ("WWTP") discharge rates are irrelevant to the question of whether Defendants can be held joint and severally liable in this case. Nonetheless, it is estimated that land-applied poultry waste contributes 59% of the phosphorus that reaches Lake Tenkiller, while *all* wastewater treatment plant discharges in Oklahoma *and* Arkansas contribute only 15% of the phosphorus reaching Lake Tenkiller. Ex. 16 (Engel Decl., 5/29/09, ¶ 6).

54-57. Defendants' statements concerning land-applied biosolids under Oklahoma permits are irrelevant and immaterial. Further, based on the conservative assumption that all treated human wastewater sludge within the IRW is land applied, such land-applied sludge still only contributes 2.9% of the phosphorus loading (net additions) to the IRW. Dkt. #1919-2 (M.

Smith Decl. and Report at 8-9, 30). By contrast, land-applied poultry waste accounts for 74% of the phosphorus loading in the IRW. *Id.* at 30. According to Defendants, the amount of treated human sewage biosolids land applied in the IRW under Oklahoma permits between 1991 and 1997 was 3,818 tons. Again, Defendants' birds generate 350,000 to 500,000 tons of poultry waste within the IRW in a single year, most of which is land applied within the IRW. *See* ¶ 15, *supra.*

ARGUMENT

I. The State's Causation Evidence as to Each Defendant Is More Than Adequate To Maintain Counts 1 – 6 and 10[5]

A. Causation May Properly Be Established by Circumstantial Evidence

The State need not prove causation by direct evidence. "'[C]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). *See also Dillon v. Fibreboard Corp.*, 919 F.2d 1488, 1490 (10th Cir. 1990) ("It is acceptable for a party bearing the burden of proof to utilize sufficient circumstantial evidence to support his or her position"). Under Oklahoma law, liability for contamination of water may be proven by circumstantial evidence. *See California Oil Co. v. Davenport*, 435 P.2d 560, 563 (Okla. 1967); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 950-51 (Okla. 1957); *McCasland v. Burton*, 292 P.2d 396, 399 (Okla. 1956); *Peppers Refining Co. v. Spivey*, 285 P.2d 228, 231-32 (Okla. 1955) (trespass case). Similarly, "CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct evidence." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000) (citations

[5] While Defendants claim to be moving for summary judgment on the State's unjust enrichment claim (Count 10) and federal common law nuisance claim (Count 5), they provide no argument or authority in support of dismissing those claims. Therefore, on its face, the MSJ should be denied with respect to Counts 5 and 10.

omitted). And, lastly, RCRA liability may also be established by circumstantial evidence. *See U.S. v. Valentine,* 856 F. Supp. 621, 627 (D. Wyo. 1994).

B. The State's Causation Evidence Meets Requirements of Oklahoma Tort Law

The State's causation proof is not novel or isolated -- it is robust, varied and undeniable. *See, e.g.*, Stat. of Disp. Facts ¶¶ 13-16, *supra.* For instance, the United States Department of Agriculture has found that "[w]ater quality problems in the Tenkiller and Spavinaw watersheds are due to excessive nutrients, pathogenic bacteria, and sedimentation" and that the practice of land applying poultry waste "has led to the excessive buildup of phosphorus that currently pollutes waterbodies…"[6] Defendants' expert, Dr. John Connolly, testified that all of the studies he looked at conclude that phosphorus runs off fields to which poultry waste has been applied, that the run-off concentrations are substantial compared to reference fields and that he has not identified any study where poultry waste has been applied that phosphorus did not run off the field.[7] Defendants nonetheless seek summary judgment on causation grounds.

Under Oklahoma law, when multiple tortfeasors' acts concur, combine, or commingle to produce an indivisible injury, they may be held jointly and severally liable even in the absence of concerted action. *See Boyles v. Okla. Natural Gas,* 619 P.2d 613, 617 (Okla. 1980). "With respect to environmental nuisances, such as pollution of a stream or pollution of the air surrounding a community, courts have commonly found that such pollution constitutes an indivisible injury." *Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27381, at *41 (N.D. Okla. July 11, 2003), *vacated in part by Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla.

[6] *See* Dkt. #2084 (USDA (July 2006), pp. 18-19).
[7] *See* Dkt. #2100-3 (Connolly Dep. at 235-36).

Jan. 13, 2004)[8] (citing *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995); *Harper-Turner Oil Co.*, 311 P.2d at 950-51; *U.S. v. Pess*, 120 F. Supp. 2d 503 (W.D. Pa. 2000)).[9]

This indivisible injury rationale has been repeatedly applied by Oklahoma courts in pollution cases. In *Union Tex. Petroleum*, the Oklahoma Court of Civil Appeals held that the defendants were jointly and severally liable for an indivisible injury contaminating an aquifer underlying the town of Cyril. In this regard, the Court reasoned:

> The single, indivisible injury at issue in this case is the contamination of the town of Cyril's water supply by saltwater used in oil and gas operations. The general rule is that where several persons are guilty of separate and independent acts of negligence which combine to produce directly a single injury, the courts will not attempt to apportion the damage, especially where it is impracticable to do so, but will hold each joint tort-feasor liable for the entire result.

Union Tex. Petroleum Corp., 909 P.2d at 149-50. Oklahoma's "indivisible injury" doctrine applies in this case, just as Judge Eagan applied it in *City of Tulsa v. Tyson Foods*:

> The injury alleged herein is a single, indivisible injury - the eutrophication of the lakes from excess phosphorus loading. Under Oklahoma and Arkansas law, regardless of whether the claim is one of negligence or intentional tort, where there are multiple tortfeasors and the separate and independent acts of codefendants concurred, commingled and combined to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.

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[8] After a settlement was entered between the *Herd* plaintiffs and defendants Blue Tee Corp. and Gold Fields Mining Corp., the July 11, 2003 was vacated as to *those two defendants only*. *See Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D.Okla. Jan. 13, 2004); and 01-CV-891-H(C), Dkt. #737. The vacation order was entered pursuant to unopposed motion. *See Herd*, 01-CV-891-H(C), Dkt. #747. The July 11, 2003 order regarding causation was not withdrawn nor its legal reasoning altered in any way. The portion of the order regarding causation was not withdrawn nor its legal reasoning altered in any way.

[9] None of the tort authority cited by Defendants in § A of the MSJ Argument involves causation in the "indivisible injury" context. *See* Motion, pp. 16-17. Thus, the tort cases cited by Defendants are simply inapplicable and provide no basis for the Court to grant summary judgment.

City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003), *vacated in connection with settlement.* (citations and internal quotations omitted).[10] In the *City of Tulsa* case, Judge Eagan further determined that: (1) "plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant"; and (2) "plaintiffs must show that each defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs." *Id.* at 1300.

Here, the State suffers a single, indivisible injury of contamination of the water bodies of the IRW caused by multiple tortfeasors whose separate and independent acts have combined to produce this foreseeable harm. The State "need not prove the portion or quantity of harm of damages caused by each particular," nor must the State "track" bacteria or phosphorus from land application sites to surface or groundwater. The *Herd* decision is highly informative in this regard. In *Herd*, lead-laden dust blown from defendants' chat piles and tailings ponds commingled in the air and contaminated the community causing an indivisible injury. In denying the defendants' various motions for summary judgment regarding causation, this Court held:

> Once the lead-laden dust reaches the air stream, it is impossible to trace its precise source. The Court therefore finds that the alleged injury is indivisible and that the … legal principles regarding joint and several liability apply. To the extent Defendants argue that they are entitled to summary judgment on grounds that Plaintiffs have failed to allege facts that 'trace' or 'quantify' the lead-laden dust causing the alleged nuisance in

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[10] The *City of Tulsa* summary judgment order should be viewed as persuasive authority. That order was vacated by unopposed motion solely as part of the settlement of that action. *See City of Tulsa*, 01-CV-0900-EA(C), Dkt. #472 and Dkt. #473 ¶ 8. It was not vacated as a result of a motion for reconsideration or any stated need to correct or negate the substance of the opinion. The *City of Tulsa* opinion is a public act of the government, which cannot be expunged by private agreement. *See Oklahoma Radio Assocs. v. Magnolia Broadcasting Co.*, 3 F.3d 1436, 1444 (10th Cir. 1993) (citations omitted). The order is available in the Federal Supplement, Second Series, contains extensive reasoning on issues pertinent to this action, and may be helpful to this Court to the extent it finds that reasoning persuasive.

> this case as to each individual Defendant's chat pile(s) or tailing pond(s), the Court finds that, under the facts present here, such tracing or quantification is not required.

Herd, 2003 U.S. Dist. LEXIS 27381, at *41-42.

The *Herd* Court also rejected defendants' argument that plaintiffs could not show each defendant contributed to the nuisance:

> The record before the Court indicates that Defendants collectively deposited over seventeen million tons of lead-laden mining waste in the Ottawa County area. Although these collective numbers are not conclusive as to any one Defendant's contribution, they clearly inform the issue of contribution, when combined with evidence of the location of Defendant's mining activities in relation to the Picher community. This case is not about a single particle from a chat pile that is miles away from Picher. Therefore, the Court finds that Plaintiffs have met the requisite threshold amount with respect to these Defendants.

Id. at *44-45. Finally, in summing up its opinion on causation, the *Herd* Court explained:

> Based on (1) the proximity of the waste materials that resulted from each particular Defendants' mining activities to the alleged area of contamination; and (2) the evidence that will be offered regarding the air dispersion of lead-laden dust from these waste materials, the Court finds that a reasonable jury could conclude that the above-listed Defendants contributed to the nuisance. Thus, Plaintiffs' allegations are not merely 'you mined and therefore you caused the injury,' but instead 'you mined and left waste materials very near the contaminated community and such waste materials have been shown to contain the type of contamination that occurred in the community.' The Court does not view the latter claims as requiring a legally impermissible leap on the causation continuum.

Id. at 45-46. The *Herd* decision is on point. In this case, it is simply not possible for the State to trace or pinpoint the precise source of each molecule of phosphorus or bacteria that has made its way to the waters of the IRW. And the State is not required to do so as a matter of law. The State has substantial evidence that *each* of the Defendants has contributed to the contamination.[11] This is all that is required.

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[11] The State has gathered and presented: (1) evidence of the volumes of waste generated annually by *each* Defendant; (2) evidence as to the number and location of active poultry houses for *each* Defendant; (3) evidence that the vast majority of poultry waste from Defendants' birds is land applied in close proximity to the houses where it is generated; (4) available soil test data

C. The State's Causation Evidence Meets Requirements of CERCLA and RCRA

Defendants also argue that the State's causation evidence is inadequate to maintain a CERCLA claim.[12] The leading Tenth Circuit case on CERCLA cost recovery causation -- which Defendants neither cite nor reference in any way -- is *Tosco Corp. v. Koch Industries, Inc.*, 216 F.3d 886, 891 (10th Cir. 2000). In *Tosco*, the Court held that "[t]he plaintiff in a CERCLA response cost recovery action involving multiple potentially responsible persons *need not prove a specific causal link* between costs incurred and an individual responsible person's waste." (Emphasis added.)[13] The *Tosco* case importantly involved causation arguments in the context of hazardous substances that had migrated from the soils into groundwater. *Id.* at 893. Again, in

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for *each* Defendant showing widespread disposal of poultry waste within the watershed; (5) evidence that poultry waste is the number one source of phosphorus loading in the IRW; (6) scientific evidence showing that some portion of land-applied poultry waste is always transported from fields to the water; (7) evidence as to the geology of the IRW establishing ready pathways for the transport of poultry waste and its constituents to surface and groundwater; and (8) modeling evidence showing that approximately 59% of the phosphorus load ultimately reaching Lake Tenkiller is from land-applied poultry waste. *See* Stat. of Disp. Facts ¶¶ 13-15, *supra.* This causation evidence is more than adequate under Oklahoma's indivisible injury doctrine for the purposes of defeating Defendants' MSJ. None of this causation evidence is dependant upon the opinions of Drs. Valerie Harwood or Roger Olsen. Thus, Defendants' assertion that the State's "claims of causation rely principally" on Drs. Harwood and Olsen is simply untrue. MSJ at 19. The PCR and PCA work of Drs. Harwood and Olsen merely provides further confirmation of what the weight of the State's causation evidence already shows. The State will address Defendants' additional criticisms of the work of Drs. Harwood and Olsen in the *Daubert* context. Because the State's causation claims are not dependent upon Harwood and Olsen, those arguments need not be decided here.

[12] Defendants also rely on the Western District of Missouri's decision in *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382 (W.D. Mo. 1994), in support of its CERCLA causation arguments. MSJ at 18. However, the *Thomas* case is inapposite. There, the sole expert offered by the plaintiff could not testify with "any reasonable degree of scientific certainty that any cause is more than just a possibility." *Thomas*, 846 F. Supp. at 1394. This is in stark contrast to the State's robust and diverse lines of evidence in this case all showing that land-applied poultry waste from Defendants' birds is a significant source of pollution in the IRW.

[13] In *Kalamazoo River Study Group v. Eaton Corp.*, 258 F. Supp. 2d 736, 740 (W.D. Mich. 2002), the court held that "[c]ourts are not required to make meticulous findings as to the precise causative contribution each of the parties have made to a hazardous site, as in many cases such a finding would be literally impossible."

this Circuit, CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct evidence. *Id.* at 892. As demonstrated throughout this Response (*see, e.g.,* Stat. of Disp. Facts ¶¶ 13-16*;* n. 11), the State has presented a wealth of circumstantial evidence showing that each of the Defendants has disposed of phosphorus (a CERCLA hazardous substance) throughout the IRW creating widespread pollution of surface and ground water. This evidence is more than sufficient to defeat Defendants' MSJ with respect to CERCLA cost recovery causation.[14]

The State's causation evidence is also more than satisfactory under RCRA. While Defendants suggest otherwise, *see* MSJ, p. 18, the majority in *Oklahoma v. Tyson Foods, Inc.,* -- F.3d --, 2009 WL 1313216 (10th Cir. May 13, 2009), reaffirmed the Circuit's "prior case law [which] indicates that under RCRA a plaintiff need not 'show proof of actual harm to health or the environment' to establish endangerment, but rather injunctive relief is appropriate where there simply *may* be a risk of harm." *Id.* at *4, quoting *Burlington N. & Santa Fe Ry. Co. v. Grant,* 505 F.3d 1013, 1020 (10th Cir. 2007) (emphasis in original). Further, the majority in *Tyson Foods* determined that in denying the State's requested preliminary injunction, this Court made a "choice between *two permissible views of the evidence.*" *Tyson Foods, Inc.,* 2009 WL

[14] Although Defendants do not make the distinction, in addition to its cost recovery claim, the State has also brought a CERCLA natural resource damage ("NRD") claim. Under §9607(a)(4)(c), NRD trustees seeking restoration must prove injury to natural resources "resulting from" a release of a hazardous substance. In *Kennecott Utah Copper Corp. v. Department of Interior,* 88 F.3d 1191, 1224 (D.C. Cir. 1996), the Court observed that "[w]hile the statutory language requires some causal connection between the element of damages and the injury - the damages must be 'for' an injury 'resulting from a release of oil or a hazardous substance' - Congress has not specified precisely what that causal relationship should be." In *Coeur D'Alene Tribe v. Asarco Inc.,* 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003), the Court held that where hazardous waste from multiple defendants has commingled, the plaintiff trustee has the burden of proving that each defendant's release is more than a *de minimis* "contributing factor" to the natural resource injuries alleged by the trustee. As established in Argument Section I(B) (and n. 11), *supra,* the State's causation evidence is sufficient to satisfy a "contributing factor" test.

1313216, at *16 n.2 (emphasis added). The other "permissible view of the evidence," as referenced by the majority, is set out in Judge Ebel's dissent. Judge Ebel determined that even without the testimony of Drs. Harwood and Olsen, "the district court…had before it significant credible evidence tending to demonstrate land-applied poultry litter's risk to the IRW's waters and the people who use them." *Tyson Foods, Inc.*, 2009 WL 1313216, at *15 (dissent). Of course, neither this Court nor the Circuit had the benefit of the State's phosphorus evidence in the RCRA context. In any event, the "permissible view of the evidence" espoused by Judge Ebel shows that there are genuine disputed facts and that summary judgment on the State's RCRA claim is not appropriate.

II. Any Contribution of the State to Pollution of Water Bodies in the IRW Is Irrelevant To Whether Defendants Are Joint and Severally Liable

The Oklahoma Supreme Court, in *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613, 616-17 (Okla. 1980), held that, despite the enactment of comparative negligence, the only exception to the joint and several liability of tortfeasors is under a negligence cause of action where a plaintiff is contributorily negligent. The several liability exception "does not apply to tort litigation in which the injured party is not a negligent co-actor." *Id.* Therefore, outside circumstances under a negligence cause of action, defendant tortfeasors are jointly and severally liable. *See, e.g., Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1034 (N.D. Okla. 1991); *Sevitski v. Pugliese*, 151 B.R. 590, 593 (N.D. Okla. 1993). Specifically, courts have long held that defendants who pollute waterways are jointly and severally liable because the harm is indivisible. *See, e.g., Prairie Oil & Gas Co. v. Laskey*, 46 P.2d 484, 485-86 (Okla. 1935); *Union Tex. Petroleum Corp.*, 909 P.2d at 150. The long-held rule in Oklahoma remains in force: defendants who create a nuisance causing an indivisible harm to a waterway, are jointly and severally liable.

Defendants' argument that they cannot be held jointly and severally liable under Oklahoma law because of the State's alleged contribution to contamination of waters of the IRW, *see* MSJ, pp. 21-25, ignores this distinction between negligence and intentional torts in Oklahoma. Defendants rely solely on comparative fault negligence cases that do not apply to the State's intentional tort claims. Because the State's claims involve intentional torts, Defendants cannot avoid joint and several liability. In the *City of Tulsa* case, the Court determined that, because the plaintiffs had dismissed their negligence claims, they had "deprived defendants of a contributory or comparative negligence defense." *City of Tulsa*, 258 F. Supp. 2d at 1302. The Court's holding in this regard is well-supported by Oklahoma law. *See, e.g., Graham v. Keuchel*, 847 P.2d 342, 363 (Okla. 1993). Alleged comparative fault on the part of the State is not a valid defense in this case and cannot form a basis for Defendants to skirt joint and several liability.

Further, even assuming *arguendo* that the State's alleged contribution were relevant, any conceivable contribution from the State is truly *de minimis* in comparison to the hundreds of thousands of tons of waste annually generated by Defendants' birds and spread in the IRW. *See* Stat. of Disp. Facts, ¶¶ 26-57.

Respectfully submitted,

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I certify that on the 5th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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